

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

ORIGINAL

76-4073

NO. 76-4073

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DISTRICT 1199, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES,
RWDSU, AFL-CIO,

Respondent.

On Application For Denial Of Enforcement
Of An Order Of The National Labor Relations
Board

BRIEF FOR RESPONDENT, DISTRICT 1199,
NATIONAL UNION OF HOSPITAL AND HEALTH
CARE EMPLOYEES, RWDSU, AFL-CIO

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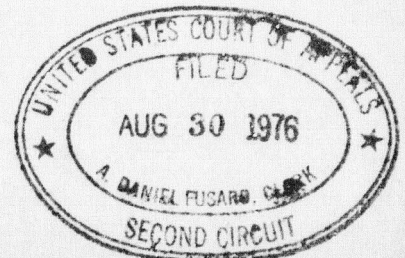


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BRIEF FOR RESPONDENT, DISTRICT 1199,
NATIONAL UNION OF HOSPITAL AND HEALTH
CARE EMPLOYEES, RWDSU, AFL-CIO

COUNTER STATEMENT OF ISSUE PRESENTED

Whether Respondent District 1199 violated Section 8(g) of the Act when four of its agents picketed for one and a half hours on a single day at a health care institution without having first served a 10-day 8(g) notice in view of the fact that the 1199 agents joined a picket line lawfully

established by another union which had complied with the notice requirements?

STATEMENT OF THE FACTS

The parties entered into a stipulation of facts (A.*13), and they are not in dispute. Local 531, Service Employees International Union, AFL-CIO (hereinafter "Local 531") represents the service and maintenance employees employed by First Healthcare Corporation d/b/a Parkway Pavilion Healthcare, a health care institution (A.14, 19). The collective bargaining agreement between Local 531 and First Healthcare expired on or about December 1, 1974 (A.14, 19). Pursuant to Section 8(g) of the Act,** Local 531 gave notice to First Healthcare of its intention to strike at 12:01 a.m. on December 20, 1974 (A.14, 19). The strike actually began on December 22 (A.14, 19). The Board has not disputed the fact that this strike and the picketing which followed complied with the requirements of Section 8(g).

* "A" refers to the printed appendix.

** Section 8(g) provides in pertinent part:

"A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

On January 4, 1975 four agents of District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (hereinafter "District 1199") joined Local 531's picket line and picketed for one and one-half hours without serving a 10 day 8(g) notice on either First Healthcare or the Federal Mediation and Conciliation Service (hereinafter "FMCS") (A.14, 15, 19). This was the only occasion during the strike in which District 1199 agents joined the Local 531 picket line. District 1199 did not represent any employees at First Healthcare, and was not seeking to organize any employees at the institution at the time the picketing took place (A.19, 34, 35). There is no indication in the stipulated record that District 1199's interest in briefly joining the Local 531 picket line was for any reason other than to express traditional labor solidarity and sympathy (A. 19, 20).

On the foregoing record the Administrative Law Judge (hereinafter "ALJ") found that the purposes of Section 8(g) had been satisfied by the notice sent by Local 531 which gave First Healthcare the time and opportunity to make arrangements for the continuity of patient care during the strike and picketing. He therefore concluded that District 1199 did not violate the Act and recommended that the complaint be dismissed (A.16-23).

The Board, in a three to two decision, reversed the ALJ, holding that § 8(g) was to be read literally and that

the section was violated by District 1199's failure to serve a 10 day notice even though Local 531 had already served such a notice (A.33-42). The Board's order requires District 1199 to cease and desist from engaging in any strike, picketing or other concerted refusal to work at the premises of First Healthcare or any other health care institution, without serving a 10 day notice.

ARGUMENT

POINT I

THE NOTIFICATION PURSUANT TO SECTION 8(g) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, GIVEN BY LOCAL 531 FULFILLED THE REQUIREMENT OF THE ACT AND THE PURPOSES FOR WHICH SECTION 8(g) WERE ENACTED. UNDER THE CIRCUMSTANCES, DISTRICT 1199 DID NOT HAVE TO GIVE A TEN DAY NOTICE PURSUANT TO SECTION 8(g)

The legislative history of the 1974 amendments to the Act makes it abundantly clear that the purposes to be served by the notice provision of Section 8(g) were satisfied in this case when Local 531 gave appropriate notice pursuant to that Section. Therefore the Board incorrectly held that District 1199 violated the Act when four of its agents joined the already lawfully established picket line and picketed for one and one-half hours on a single occasion.

The purposes of Section 8(g) are clearly set forth in Senate Report No. 93-766, 93rd Cong., 2d Sess. 4 (1974):

"It is in the public interest to insure the continuity of health to the Community and the care and well being of patients by providing for a statutory advance notice of any anticipated strike or picketing. For this reason, the Committee approved an amendment adding a new Section 8(g) which generally prohibits a labor organization from striking or picketing a health care institution without first giving 10 days' notice. . . .

"The 10-day notice is intended to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care. . . ."

Exactly the same language is found in H. R. Report No. 93-1051, 93rd Cong., 2d Sess. 5(1974). To the same effect, see also the remarks of Senator Taft in the Congressional Record on July 10, 1974 at S.12108; remarks of Representative Ashbrook in the Congressional Record on May 30, 1974 at H.4589; remarks of Senator Cranston in the Congressional Record on May 2, 1974 at S.6932; and the remarks of Senator Williams in the Congressional Record on May 2, 1974 at S.6934.

Thus, in every reference to Section 8(g), the stated purpose of Congress in enacting the 10-day notice requirement was to give health care institutions sufficient advance notice of a strike or picketing to make arrangements for the continuity of patient care.

The Section 8(g) notice was served by Local 531 on First Healthcare on December 9, 1974. The strike began on

December 22, 1974. The four District 1199 organizers engaged in one and one-half hours of picketing on January 4, 1975, 26 days after the Section 8(g) notice was served on First Healthcare. Certainly, the 26 days which elapsed were more than sufficient time to meet the purposes of Section 8(g) and allowed First Healthcare to prepare for patient care during the strike.

As was cogently noted by the ALJ in his decision and order recommending dismissal of the complaint:

"The brief presence of the four District 1199 pickets, along with Local 531 pickets, on the Local 531 picket line did not basically change the character of the picketing, nor broaden its objectives. Nothing in this record suggests that District 1199's one and a half hours joinder in Local 531's picketing was calculated or might be anticipated to generate any new or different economic pressures on First Healthcare of a kind not previously present in Local 531's picketing." (A.22).

The Board's reliance on the statement of Senator Javits that "10 days notice of any strike or picketing, including stranger picketing, must be given to a health care institution" (120 Cong. Rec. S.6935 (Daily Ed. May 2, 1974)) to support its conclusion that District 1199 was required under Section 8(g) to serve a separate 10-day notice before engaging in "sympathy picketing" even though Local 531 had already complied with 8(g) by serving a proper notice which gave First Healthcare the requisite opportunity "to insure the continuity of health care to the community and the care and well-being of

patients", is misplaced and distorts Congressional intent.

"Stranger picketing" simply means picketing engaged in by individuals not employed by the employer being picketed.* This is the burden of Senator Taft's enumeration of examples of picketing which would fall within the boundaries of Section 8(g).

"As examples, this subsection would apply to recognition strikes, area standard strikes, jurisdictional strikes, and the like." (120 Cong. Rec. S.6941 (Daily Ed. May 2, 1974)). See also Senator Taft's remarks at 121 Cong. Rec. S.20466 (Daily Ed. November 19, 1975) condemning the Board for its broad interpretation of Section 8(g) in another context.

Thus if District 1199 did not represent any employees at First Healthcare but sought to organize such employees, it could not engage in picketing at First Healthcare in support of such a goal without first serving a 10-day notice. The purpose, as stated in the Congressional reports, is to give the health care institution an opportunity to provide for the continuity of patient care. This purpose was met in this case when Local 531 served an appropriate notice. Thus the comments of Senators Taft and Javits are not pertinent to the situation at hand.

Senator Williams, chairman of the committee and Sponsor of the legislation which originated in the Senate specifically cautioned the Board against interpreting the

* "Stranger Picketing - picketing by individuals who are not employees of the company being picketed. Usually they belong to a union which is seeking to organize employees in the plant." Roberts' Dictionary of Industrial Relations, 407 (1966).

hospital amendments in an overly expansive manner and to hunt for violations when none were intended by Congress. Senator Williams noted:

"This legislation is the product of compromise, and the National Labor Relations Board in administering the act should understand specifically that this committee understood the issues confronting it, and went as far as it decided to go and no further and the Labor Board should use extreme caution not to read into this act by implication - or general logical reasoning - something that is not contained in the bill, its report and the explanation thereof." (120 Cong. Rec. S.12104 (Daily Ed. July 10, 1974)).

The Senator went on to give some examples of situations where 10 day notices would not have to be served. One involved the following situation:

"Tenth, the NLRB General Counsel poses a situation where a previously noticed strike begins, and then for some reason the strike 'ceases for a while.' Under these circumstances he opines that he will issue a complaint where the union then resumes picketing without giving another 10-day strike notice. This is yet another instance where the General Counsel is seeking to expand upon the actions of this Congress. Had the committee intended to require another 10-day notice to be served under these circumstances it knew how to so provide. The Board has no license to intrude upon otherwise protected activities except as provided by the Congress." (120 Cong. Rec. S.12104, 12105 (Daily Ed. July 10, 1974)).

The reason for this statement is clear. The parties in the circumstances given are likely to be meeting face to face and thus the employer would be aware of the union's intentions. Thus it would not require a second notice to protect the

well-being of patients.

Another instance cited by Senator Williams where it would not be necessary to serve a 10-day notice on an employer involved the ally doctrine.

"[I]t was the intention of the committee to modify the Ally doctrine in order to permit a neutral hospital to supply essential personnel and equipment to a hospital involved in a labor dispute, or accept that hospital's critically ill patients so that a continuity of medical treatment might be maintained. However, the committee did not intend to extend this exception to a hospital which provides personnel other than for the above purposes, and in so doing enmeshes itself into the primary dispute. In such a case, the intervening hospital should no longer enjoy the immunity intended by the bill, and should be subject to the Ally doctrine. Thus, under these circumstances it would be quite inconsistent with the bill's intent to require a second 10-day notice to a hospital employee, who of necessity, must have already been aware of the existence of the labor dispute at issue." (120 Cong. Rec. S.12105(Daily Ed. July 10, 1974)).

If a second 10-day notice is not required to be sent to a hospital which is already aware of the existence of a dispute, then a fortiori, a second 10-day notice is not a requirement in this case when District 1199 joined an already existing picketing line after Local 531 had already given a proper 10-day notice.

District 1199 submits that under these circumstances it did not have to give any notice at all. It is a distortion of the intent of Congress to require a Section 8(g) notice of District 1199 under the facts of this case. To do so would mean that in many, if not most cases, additional employees or others would be barred from joining a picket line

as the original strike may be concluded prior to the service of a second 10-day notice. Such a devastating effect on Section 7 rights of employees should not be enforced in the absence of clear Congressional intent to accomplish such a drastic restriction of an activity traditionally engaged in by labor organizations and their sympathizers.*

POINT II

IN ANY EVENT THE PICKETING ENGAGED
IN BY DISTRICT 1199 WAS A MINOR
ISOLATED INSTANCE INVOLVING DE
MINIMUS CONDUCT AND THUS THE COMPLAINT
SHOULD HAVE BEEN DISMISSED

The picketing engaged in by District 1199 involved only four pickets. The picketing lasted for one and one-half hours on a single day. The picketing was extremely brief, isolated, without any impact, and was not repeated.

Senator Williams expressed his concern that the

* Since this case involves the interpretation of statutory language whose meaning is in doubt, the issue before the Court involves a question of law and thus the Court is not bound by the substantial evidence rule and may substitute its judgment for that of the Board's if in its opinion the latter's interpretation of the statute is erroneous. NLRB v. Radio & Television Broadcast Eng. Un., Local 1212, 364 U.S. 573 (1961); United Steelworkers of America, AFL-CIO v. NLRB, 243 F.2d 593, 600 (D.C. Cir. 1956), rev'd. in part on other grounds, 357 U.S. 357 (1958); NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961).

General Counsel should not dissipate the efforts of his office in litigating minor matters. In the Congressional Record of July 10, 1974, Senator Williams stated at S.12104:

"[T]he NLRB General Counsel expresses a willingness to litigate many technical issues which he says are not clear in this bill. One would hope that both the General Counsel and the Board would not search around for technicalities but put the desire to litigate in the background and instead adhere to the will of the Congress.

"In this connection, I note the statement that section 8(g) would be violated if less than 12 hours notice was given. Suppose, for example, that the union gave 11 hours notice. Clearly, the committee never intended that the General Counsel dissipate the efforts of his office and the Board by litigating such technical minutiae."

The facts in this case involve the same type of minutiae which Senator Williams suggested that the General Counsel and the Board should not be concerned with. No harm was done to First Healthcare and no damages were suffered by it.

In a number of cases, the Board has dismissed complaints where it found that violations involved minor isolated incidents. In Fearn International, Inc., 209 NLRB 232 (1974) a supervisor interrogated an employee on how she and others would vote in a decertification election. While this was a violation of Section 8(a)(1) of the Act, the Board held that

this was an isolated and non-coercive incident and the Board dismissed the complaint. (See also, Craftsman Electronic Products, Inc., 179 NLRB 419 (1969)).

In Rosella's Fruit and Produce Co., Inc., 199 NLRB No. 109, 82 LRRM 1080 (1972), the employer violated Section 8(a)(1) of the Act when it requested an employee to investigate and report the union's strike plans and also suggested that the employee consider resigning from the union. Since the incident was an isolated one and unlikely to reoccur, the Board dismissed the complaint.

In Consolidated Freightways Corporation of Delaware, 181 NLRB 856, 862 (1970), the office manager made a threat of economic reprisal against an employee for filing grievances, in violation of Section 8(a)(1) of the Act. Once again, since the incident was an isolated one, the Board dismissed the complaint. See also Eaborn Trucking Service, 156 NLRB 1370 (1966); Howell Refining Co., 163 NLRB 18 (1967); Decker Disposal, Inc., 171 NLRB 879 (1968). *

* The Board has failed to articulate any basis for not finding that this case involves de minimus conduct while the cases cited do come within the de minimus doctrine. Therefore, at a minimum, the case should be remanded to the Board for its reasoning on this question. Cf. NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965).

Courts have also refused to enforce orders of the Board involving isolated de minimus situations. In J. J. Newberry Co. Inc. v. NLRB, 442 F.2d 897 (2d Cir. 1971) the Court held that in view of the isolated nature of a supervisor's statement, the violation was de minimus and the Court declined to enforce the Board's order. See also, Teamsters Local 200 v. NLRB, 233 F.2d 233 (7th Cir. 1956) (finding that violation was so "isolated" as not to warrant remedial relief); Hill-Behan Lumber Co. v. NLRB, 396 F.2d 807 (5th Cir. 1968).

District 1199 merely demonstrated its sympathy with another union in an isolated situation, on one day, for a very brief period of time. If this be deemed an unfair labor practice by the Board it constitutes a gross perversion of the intent of Congress.

POINT III

THE BOARD'S ORDER IS OVERLY BROAD

The Board's order not only directs District 1199 to cease and desist from picketing at First Healthcare without first serving a 10-day notice, but also prohibits it from engaging in any strike or other concerted refusal to work at First Healthcare or any other health care institution, unless such a notice is served (A.40). However District 1199 was not found guilty of any violation other than picketing at

First Healthcare. Thus the Board's order has no support in the record and may not stand. NLRB v. United Brotherhood of Carpenters & Joiners of America, AFL-CIO, 276 F.2d 694 (7th Cir. 1960).

The United States Supreme Court has condemned the practice of issuing broad orders encompassing violations not found in the record. In Communications Workers of America v. NLRB, 362 U.S. 479, 480, 481 (1960) the Court, in modifying a Board order, used the following language applicable to this case:

"Petitioners were not found to have engaged in violations against the employees of any employer other than Ohio Consolidated and we find neither justification nor necessity for extending the coverage of the order generally by the inclusion therein of the phrase 'any other employer.' 'It would seem * * * clear that the authority conferred on the Board to restrain the practice which it has found * * * to have [been] committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.'"

CONCLUSION

For the above stated reasons the order of the Board should not be enforced.

Respectfully submitted,

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1199, National Union of Hospital
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Of Counsel:

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United States Court of Appeals
for the Second Circuit

Docket
~~Index~~ No. 76-4073

National Labor Relations Board,

Petitioner

~~Plaintiff~~

against

District 1199, National Union of Hospital
and Health Care Employees, RWDSU, AFL-CIO

Defendant

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF New York

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 65 East 97th St.
New York, N.Y. 10029

That on August 30

19 76 deponent served the annexed

Brief for Respondent

on Elliott Moore, Esq., Deputy Associate General Counsel
attorney(x) for National Labor Relations Board
in this action at Washington, D.C. 20570

the address designated by said attorney(s) for that purpose by depositing ^{two} ^{ies} a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me

August 30, 1976

George Cohen

Anthony Verner

The name signed must be printed beneath